83-788

No._____

IN THE

Supreme Court of the United States

October Term, 1983

NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE,

Appellant,

vs.

UNITED STATES OF AMERICA, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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Question Presented

Whether the plan of reorganization of American Telephone and Telegraph Company (AT&T) violates the Decree by allowing AT&T to retain customer premises equipment while transferring the enormous costs of installing and testing this equipment to the newly divested Bell Operating Companies?

Parties Below

In addition to the United States, American Telephone & Telegraph Company ("AT&T"), Western Electric Company, Inc., and Bell Laboratories, Inc., the following parties were admitted as intervenors by District Court order entered August 26, 1982 (J.A. 191-194): *Ad Hoc* Telecommunications Users Committee; American Newspaper Publishers Association; American Petroleum Institute; American Satellite Company; Associated Telephone Answering Exchanges, Inc.; Association of American Railroads; Association of Data Communications Users; Association of Data Processing Service Organizations; Audichron Company; Black Citizens for a Fair Media; California Hispanics; Citizens Utilities Company; Communication Commission of the National Council of the Churches of Christ in the USA; Communications Workers of America; Compuserve, Inc.; Computer and Business Equipment Manufacturers Association; Computer and Communications Industry Association; Congress Watch; Continental Telecom, Inc.; D/FW Signal, Inc.; Education and Cultivation Division of the General Board of Global Ministries of the United Methodist Church; Federal Communications Commission; General Dynamics Communications Co.; General Telephone & Electronics Corp.; Independent Data Communications Suppliers' Council; International Telephone and Telegraph Corp.; Jack Faucett Associates, Inc., *et al.*; Leghorn Telepublishing Co.; MCI Communications Corp.; Mobile Marine Radio, Inc.; National Association for the Advancement of Colored People; National Association for Better Broadcasting; National Association of Broadcasters; National Association of Regulatory Utility Commissioners; National Association of State Utility Consumer Advocates; National Cable Television Association; National Catholic Broadcasters Association; National Citizens Committee for Broadcasting; National Latino

Media Coalition; National Newspaper Association; North American Telephone Association; Northeastern Telephone Co.; Office of Communication of the United Church of Christ; Reformed Church in America; Rogers Radio Communication Services, Inc.; Rural Telephone Coalition; San/Bar Corp.; Satellite Business Systems; Sonitrol Distributors Council, Inc.; Southern Pacific Communications Company; Sperry Corporation; Stromberg-Carlson Corp.; Tandy Corporation; Telocator Network of America; U.S. Telephone Communications, Inc.; United States Independent Telephone Association; United States Telecommunications Suppliers Association; United Telecommunications, Inc.; Utilities Telecommunications Council; Warner Amex Cable Communications, Inc.; Western Union Telegraph Co.; Westinghouse Broadcasting and Cable, Inc.; Alarm Industry Telecommunications Committee; States of Arizona, California, Colorado, Delaware, Illinois, Maine, Maryland, Michigan, Missouri, New Hampshire, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Tennessee, Virginia, Wisconsin; Alabama Public Service Commission; Arkansas Public Service Commission; California Public Utilities Commission; District of Columbia Public Service Commission; Florida Public Service Commission; Idaho Public Utilities Commission; Kentucky Public Commission; Michigan Public Service Commission; Missouri Public Service Commission; Montana Public Service Commission; Nebraska Service Utilities Commission; Nevada Public Service Commission; New York State Department of Public Service; South Dakota Public Utilities Commission; Utah Public Service Commission; Public Service Commission of West Virginia; Wisconsin Public Service Commission; Wyoming Public Service Commission; Iowa Commerce Commission; Kansas Corporation Commission; New Mexico Corporation Commission; Virginia State Corporation Commission; Washington Utilities & Transportation Commission; City of Cincinnati; and the City of New York.

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JURISDICTIONAL STATEMENT

Appellant, New York State Department of Public Service (hereinafter NYS DPS), respectfully requests that this Court note probable jurisdiction of its appeal from the District Court's opinion filed July 8, 1983; its memorandum filed July 28, 1983; and its memorandum and order filed August 5, 1983 approving AT&T's plan of reorganization, as modified. The appeal has been

certified to this Court, pursuant to the Expediting Act (15 U.S.C. §29[b]), by District Court order filed September 7, 1983.

Opinions Below

The opinion of the District Court filed August 11, 1982 (J.A. 1-172)[1], and the modification of final judgment filed August 24, 1982 (J.A. 173-190), are officially reported as *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd. mem. sub nom. Maryland v. United States*, _____ U.S. _____, 75 L. Ed. 2d 472, 103 S. Ct. 1240 (1983).

The District Court's opinion of July 8, 1983 (J.A. 195-330), not yet officially reported, is published at Trade Reg. Rep. (CCH), Rpt. No. 604 (extra ed. July 19, 1983). The District Court's memorandum of July 28, 1983 (J.A. 331-340) is neither officially nor unofficially reported. The District Court's memorandum and order of August 5, 1983 (J.A. 341-350), not yet officially reported, are published at 1983-2 Trade Cas. (CCH) ¶65, 536. The District Court's order of September 7, 1983 (J.A. 351-354), not yet officially reported, is published at 1983-2 Trade Cas. (CCH) ¶65, 596.

[1] References to "J.A." are to the Joint Appendix to the Jurisdictional Statements filed herewith by the New York State Department of Public Service and the People of the State of California and the Public Utilities Commission of the State of California.

Jurisdiction

On August 24, 1982, the District Court entered a modification of final judgment ("MFJ") in a civil antitrust action initiated by the Department of Justice against AT&T. This Court affirmed the entry of the MFJ. *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd. mem. sub nom. Maryland v. United States*, _____ U.S. _____, 75 L. Ed. 2d 472, 103 S. Ct. 1240 (1983).

Pursuant to the terms of the MFJ, AT&T thereafter filed a plan of reorganization setting forth the manner in which it proposed to implement the provisions of the decree. The District Court conducted proceedings under the Antitrust Procedures and Penalties Act, 15 U.S.C. §16 to ascertain whether the plan was consistent with the principles and provisions of the MFJ and otherwise in the "public interest." By the District Court's opinion filed July 8, 1983; its memorandum filed July 28, 1983; and its memorandum and order entered August 5, 1983, the District Court rejected the arguments set forth here and approved AT&T's plan of reorganization, as modified. The District Court's August 5, 1983 order, approving the plan as "consistent with the provisions and principles" of the MFJ (J.A. 350), is a final order for purposes of appeal.

On September 13, 1983, the New York State Department of Public Service ("NYS DPS") filed a timely notice of appeal from such order. On September 7, 1983, the District Court had granted the motion of the Department of Justice to certify another appeal from the District Court's August 5, 1983 order[2] to this Court

[2] The People of the State of California and the Public Utilities Commission of the State of California filed a notice of appeal from the District Court's August 5, 1983 order on August 10, 1983 (J.A. 355-356).

pursuant to the Expediting Act (J.A. 351-354). The District Court's certification order to this Court is applicable to the instant appeal (J.A. 352).

Statutory Provisions

The text of 15 U.S.C. §§16 and 29 is set forth at J.A. 359-364.

Statement of the Case

On August 24, 1982, following "public interest" proceedings held pursuant to the Tunney Act (15 U.S.C. §16), the District Court entered a "modification of final judgment" (hereinafter "MFJ" or "decree") which settled certain civil antitrust litigation between the Department of Justice and AT&T (J.A. 173-190). The MFJ set forth the general principles and guidelines under which a fundamental restructuring of the Bell System was to take place. As it pertains to the subject matter of this appeal, the decree required the 22 local Bell Operating Companies (BOCs) to transfer their in-place customer premises equipment (CPE) base to AT&T. That is, the MFJ required the BOCs to separate and transfer to AT&T:

> *All* facilities, personnel, and books of account . . . *relating to . . . the provision of customer premises equipment to the public.* (MFJ, Section I[A][2]; J.A. 174) (emphasis added).

Pursuant to section I[A] of the MFJ (J.A. 174), AT&T was required to file a plan of reorganization setting forth the specific manner and means by which it proposed to implement the decree's reorganization of the Bell System. District Court approval of this plan of reorganization, "as being consistent with the provisions

and principles of the decree," was required before the reorganization could proceed (MFJ, §VIII[J]; J.A. 185).

In December of 1982, AT&T filed its plan. Pursuant to the terms of the MFJ, it properly assigned the actual customer premises equipment to AT&T.[3] The plan failed, however, to provide for the transfer of certain CPE-related costs (referred to as "station handling costs") to AT&T. These expenses, booked in Account 232 of the Uniform System of Accounts, are capitalized labor costs incurred in the handling, installation, and testing of the CPE to be transferred to AT&T. Station handling costs are the subject matter of this appeal.

NYS DPS objected to AT&T's proposal to assign these CPE-related costs to the post-divestiture BOCs. We contended that these costs were *indisputedly* incurred "in the provision of customer premises equipment to the public" and were thus assignable to AT&T under Section I[A][2] of the decree. In response, AT&T argued that although station handling costs related to customer premises equipment, they could not be quantified and thus could not be transferred to AT&T.

Both NYS DPS and the Public Utilities Commission of the State of California subsequently demonstrated that station handling costs could be identified in a reasonably accurate manner. In fact, NYS DPS pointed out that New York Telephone had recently presented a detailed analysis and breakdown of Account 232 and had segregated station handling costs.

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[3] Most of the BOCs' investment in actual CPE is accounted for in Accounts 231 ("Station Apparatus") and 234 ("Large Private Branch Exchanges") of the Uniform System of Accounts. The plan assigned these two accounts to AT&T.

By opinion filed July 8, 1983 (J.A. 195-330), the District Court stated that it would approve the plan of reorganization, provided that AT&T made certain modifications (not relevant here) to its plan. The Court did not discuss the issue of Account 232 "station handling" costs. Thereafter, upon the filing of several motions for reconsideration, the Court issued a memorandum opinion which, *inter alia*, addressed and rejected the argument that station handling costs should be transferred to AT&T (J.A. 341-348). Specifically, the Court stated:

> Account 232 also includes the capitalized labor costs associated with the installation and testing of customer premises equipment, and a theoretical case could be made that, since under the plan embedded CPE is being transferred to AT&T so should be this portion of Account 232. However, the court was and is persuaded by AT&T's argument, for the reasons stated in AT&T's Response to Objections at 154-155, that there is no practical way to separate out the various handling costs (J.A. 344).

It is respectfully submitted that the District Court's ruling on this issue was predicated on a fundamental mistake of fact and otherwise not in the public interest. Station handling costs *can* be identified with as much certainty as a myriad of other assets and costs being transferred in the divestiture proceeding.

The Question is Substantial

The question concerning the proper disposition of station handling costs is indeed "substantial." The station handling costs associated with the customer premises equipment which AT&T will retain are *at least* $106 million and possibly as high as $600 million in New York State alone.[4] Assigning these costs, without the equipment they are associated with, to New York Telephone places that company in the untenable position of either writing them off or seeking to convince state regulators that they should be borne by local exchange customers. In short, the question under review directly impacts on the future viability of the new operating companies, which will serve 80% of this country's telephone subscribers.

The resolution of this question will also have a substantial impact on the competitive environment of the customer premises equipment marketplace. CPE vendors other than AT&T will have to reflect the costs of ordering, installing, and testing their equipment in their prices. If AT&T is successful in its plan to assign its own station handling costs to the new operating companies, it will enter the CPE marketplace with an unwarranted competitive advantage. Such circumstances are neither consistent with the principles and provisions of the MFJ nor the public interest.

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[4] New York Telephone, NY PSC Case 28446, has quantified station handling costs at $106,442,000. However, its figure gives no recognition to the $487,882,000 Account 232 residual.

Although the *precise* quantification of station handling costs involve some judgment, the point is that the costs are *at least* $106,442,000 in New York alone. There is no basis for simply ignoring *these* costs and providing AT&T with a windfall.

Finally, NYS DPS wishes to emphasize that the Court's plenary consideration of the issue raised herein (with full briefs on the merits and oral argument) would *not* delay the AT&T divestiture schedule for January 1, 1984. Irrespective of when the Court adjudicates this appeal, the reorganization of the Bell System will go forward. If the Court finds after January 1, 1984 that station handling costs should have been retained by AT&T, it can direct the District Court[5] (with the assistance of the parties) to arrive at a reasonable estimate of these costs. AT&T could then be directed to assume a corresponding portion of the operating companies' debt and equity.

Conclusion

Based on the foregoing reasons, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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[5] Pursuant to Section VIII[I] of the MFJ, the District Court has retained continuing jurisdiction "for the construction or carrying out of this decree [and] for the enforcement of compliance therewith." (J.A. 185).